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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 586.

ISOM GRAYSON, *ET AL., Petitioners,*

vs.

JAMES A. HARRIS, WILLIAM H. HARRIS, JAMES H. KENNEDY, OHIO CITIES GAS COMPANY, *Respondents.*

ISOM GRAYSON, *ET AL., Appellants,*

vs.

JAMES A. HARRIS, WILLIAM H. HARRIS, JAMES H. KENNEDY, OHIO CITIES GAS COMPANY, *Appellees.*

STATEMENT, BRIEF AND ARGUMENT FOR PETITIONERS.

On the 1st day of October, 1923, petitioners filed their petition in this court for writ of *certiorari* which was granted on the 12th day of November, 1923. They have also brought the case here by writ of error.

Statement of the Case.

This suit involves an undivided one-half interest in two Creek allotments situated in Creek County, Oklahoma, which were allotted and patented on July 9th, 1906, to Nancy Colbert and Garfield Colbert, respectively, both of whom were enrolled Creek Freedmen.

The action was originally instituted in the District Court of Creek County, Oklahoma, and from the decision in that court in favor of the plaintiffs there, petitioners here, the respondents, Harris, *et al.*, appealed to the Supreme Court of the State of Oklahoma, which court reversed the decision of the Oklahoma District Court of Creek County, with instructions to enter judgment quieting the title of the respondents, James A. Harris and William H. Harris to the lands in controversy. The opinion is set forth in full at pages 64 to 73 of the printed record and is reported in the 216 Pacific Reporter at pages 446 to 450, inclusive, under the title of *Harris, et al.*, v. *Grayson, et al.* After petitions for rehearing were overruled by the said Supreme Court (Rec., pp. 73, 75 and 80), the case was brought here as above stated.

The Supreme Court of Oklahoma, through its Chief Justice, certified that the record on which its opinion in the case was based consists of the pleadings and the special findings and judgment of the District Court of Creek County, Oklahoma (Rec., p. 81).

The material facts found by the District Court of Creek County and considered by the Supreme Court of Oklahoma are incorporated in the District Court's judgment and decree and are found at pages 44 to 49, inclusive, of the record. The material and relevant facts necessary for a clear presentation of the grounds for reversal in this court are:

Nancy Colbert, the allottee of one of the tracts of land in controversy, died about March 1, 1900, without issue and unmarried, leaving her surviving her father, Jim Colbert, and her mother, Louisa Grayson; Louisa Grayson died intestate on March 7, 1900, leaving her surviving her husband, Jim Colbert, her son Garfield Colbert, and her daughter, Gertrude Grayson. Garfield Colbert died in June, 1900, leaving him surviving his father, Jim Colbert, and his half sister, Gertrude Grayson. Gertrude Grayson died intestate in April, 1907, unmarried and without issue, leaving her surviving her maternal grandmother, Cloria Grayson, her maternal great uncle, Jim Boy Tobler, her maternal great aunt, Micy Keys, and the plaintiffs in the District Court, petitioners here, descendants of other maternal great uncles and aunts.

The allottee of the other tract of land in controversy, Garfield Colbert, died without issue and unmarried in June, 1900, leaving him surviving his father, Jim Colbert, and his half sister, Gertrude Grayson. Gertrude Grayson died intestate in April,

1907, unmarried and without issue, leaving her surviving her maternal grandmother, Cloria Grayson, her maternal great uncle, Jim Boy Tobler, her maternal great aunt, Micy Keys, and the plaintiffs in the District Court, petitioners here, descendants of other maternal great uncles and aunts.

The evidence shows that Gertrude Grayson was a bastard and left surviving her Cloria Grayson, her non-citizen maternal grandmother, Jim Boy Tobler, her citizen maternal great uncle, Micy Keys, her citizen maternal great aunt, and plaintiffs in the District Court, petitioners here, the enrolled Creek citizen descendants of other maternal great uncles and aunts.

Cloria Grayson is a non-citizen of the Creek Nation, never having been enrolled as a citizen and is not a person of Indian blood.

Based upon these facts petitioners claim to have inherited from Gertrude Grayson her undivided one-half interest in both allotments while respondents claim that Cloria Grayson inherited this interest.

BRIEF.

I.

The first proviso of section six of the Creek Supplemental Treaty looks to the future as well as the present. It is intended as a rule of descent applicable to all Creek lands. Its purpose is to give Creek citizens and their Creek descendants a preferred right to inherit Creek lands in all cases of intestate descents from the allottee, immediately or mediately, from inheritance to inheritance, until the failure of the two classes named in the proviso.

—*Washington* v. *Miller,* 34 Okl. 259, 129 Pac. 58, 235 U. S. 422, 59 L. ed. 295;

Lamb v. *Baker,* 27 Okl. 739, 127 Pac. 189;

Hughes Land Co. v. *Bailey,* 30 Okl. 194, 120 Pac. 490;

Iowa Land & Trust Co. v. *Dawson,* 37 Okl. 593, 134 Pac. 39;

Cowokochee v. *Chapman,* 76 Okl. 1, 171 Pac. 50, 215 Pac. 757;

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Wabash R. Co. v. *United States,* 178 Fed. 5, 101 C. C. A. 133, 21 Ann. Cas. 819;

Young v. *Regents of University,* 77 Kan. 239, 124 Pac. 150, Ann. Cas. 1913-D. 701;

U. S. v. *Detroit First Nat. Bk.,* 234 U S. 235, 34 Sup. Ct. Rep. 726, 58 L. ed. 1298;

Chase v. *Swayne,* 88 Tex. 218, 30 S. W. 1049, 53 A. S. R. 742.

II.

Under the provisions of section 28 of an Act of Congress approved March 1, 1901 (31 Stat. L. 861), known as the Original Creek Agreement, as modified by section 6 of the Supplemental Agreement (Act of June 30, 1902), a Creek citizen who died before receiving his allotment of lands at the time of his death was not seized of an inheritable estate in lands afterwards allotted to him or to his heirs and the first descent occurs upon the death of the heir or heirs to whom said lands were allotted.

—*McKee* v. *Henry,* 201 Fed. 74, 119 C. C. A. 312;

Sizemore v. *Brady*, 235 U. S. 441, 59 L. ed. 311;

McDonald, et al., v. *Ralston, et al.*, 166 Pac. 405;

Hamilton, et al., v. *Bahnsen, et al.*, 183 Pac. 413;

Brady v. *Sizemore*, 33 Okl. 169, 124 Pac. 615;

Scott v. *Jacobs*, 40 Okl. 522, 140 Pac. 148;

Shulthis v. *McDougal*, 162 Fed. 331, 170 Fed. 529.

ARGUMENT.

Petitioners contend that the Supreme Court of Oklahoma has denied them rights which they claim and to which they are entitled under the provisions of Section Six of a treaty with the Creek Nation of Indians, which treaty was confirmed by the Act of Congress approved June 30, 1902 (32 St. L. 501). And they contend that the Supreme Court of Oklahoma in the guise of construction of said treaty has denied generally to citizens of the Creek Nation rights given them by said treaty and has held that persons who were not Indians are entitled to property to which the treaty, by its express terms, says they are not entitled.

The lands in controversy are in the Creek Nation. Cloria Grayson was not a citizen of the Creek Nation and was not of Creek blood and your petitioners are citizens of the Creek Nation and are of

Creek blood and are the nearest kin of Gertrude Grayson, deceased, except Cloria Grayson. The case therefore turns upon the construction of this section, which reads as follows:

> "The provisions of the Act of Congress approved March 1, 1901 (31 St. L. 861), insofar as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49, Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided*, that only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation; and *provided* further, that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said chapter 49."

Construing this treaty the Supreme Court of the state in its opinion held:

First. That while the provisos of Section 6 controlled the devolution of the allotments in controversy and confined the descent to Creek citizens and their Creek descendants, also held that said provisos were inapplicable on second descent of such allotment;

Second. That the allotments in controversy were not first descent to petitioners and were therefore controlled by the applicable provisions of chapter 49 of Mansfield's Digest of the Statutes of Arkansas.

These holdings are evidenced by the syllabus in the case which is as follows (Rec., p. 64):

> "*1.* The Supplemental Creek Agreement of June 20, 1902, 32 Stat. at L. 500, providing that the descent of Creek allotments should be according to chapter 49 of Mansfield's Digest of the Laws of Arkansas, and the proviso of section 6 of said treaty, providing: 'That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: And provided further, that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said chapter 49—.' *Held,* said proviso controls, and confines the devolution of the allotment of a deceased Creek allottee on first descent to Creek citizens or their Creek descendants, but is inapplicable on second descent of such allotment, and the descent of such allotment, after first descent, is controlled by the applicable provisions of chapter 49 of Mansfield's Digest of the Statutes of Arkansas.
>
> "Record examined, and *held*, that the trial court committed reversible error in applying the provisions of the proviso of section 6 of said treaty to the estate of the deceased, such deceased having died in April, 1907, and said estate not being the allotment of said deceased, but having come to said deceased by inheritance."

We contend that the Supreme Court of Oklahoma erred in holding that the provisos to section 6, *supra*, governed the devolution of the allotments only on first descent and also in assuming and in effect

holding that the allotments in controversy were acquired by the heirs of the allottees by inheritance.

We turn now to our first proposition which we desire to present to this court, which is:

I.

The first proviso of section six of the Creek Supplemental Treaty looks to the future as well as the present. It is intended as a rule of descent applicable to all Creek lands. Its purpose is to give Creek citizens and their Creek descendants a preferred right to inherit Creek lands in all cases of intestate descents from the allottee, immediately or mediately, from inheritance to inheritance, until the failure of the two classes named in the proviso.

Section 6 is a re-enactment of the provisions of the Act of May 27, 1902 (32 St. L. 245 at 258), with the addition of two provisos which limit the descent to the heirs who are citizens of the Creek Nation and those who are descendants of Creek citizens.

—*Washington* v. *Miller*, 34 Okl. 259, 129 Pac. 58, 235 U. S. 422, 59 L. ed. 295;

Lamb v. *Baker*, 27 Okl. 739, 127 Pac. 189;

Hughes Land Co. v. *Bailey*, 30 Okl. 194, 120 Pac. 490;

Iowa Land & Trust Co. v. *Dawson*, 37 Okl. 593, 134 Pac. 39;

Cowokochee v. *Chapman*, 76 Okl. 1, 171 Pac. 50, 215 Pac. 757.

Under these decisions no one outside of the two classes named had an inheritable status and any kinsman belonging to either class named, however remote, took the estate to the exclusion of the other heirs, who were not of the two favored classes.

The descent of the lands in controversy therefore is to be determined by applying the Arkansas law of descent and distribution to the heirs who have an inheritable status, to-wit, citizens or Creek descendants of citizens of the Creek Nation. The petitioners in this case are Creek citizens, as was found by the trial court and conceded in the opinion of the Supreme Court of Oklahoma (Rec., pp. 64-73). It is unnecesasry to discuss the Arkansas law of descent since there is no controversy on that point in this case. Petitioners concede that Cloria Grayson would inherit the interest claimed by them except for her exclusion from the inheritance by reason of not coming within the terms of the proviso, as Cloria Grayson was not a citizen of the Creek Nation, nor a Creek descendant of such citizen.

We contend that the language of the first proviso is plain, unambiguous and explicit, and that its meaning cannot be mistaken. That it looks to the future as well as the present and is intended as a rule of descent applicable to all Creek lands, the purpose being to give Creek citizens and their Creek descendants a preferred right to inherit in all cases of intestate descents from the allottee directly as well as to intestate descents from a Creek heir of

the allottee, from inheritance to inheritance until there is a total failure of the line of Creek blood. We also contend that under the two provisos, when construed together, a non-citizen, such as Cloria Grayson, can never inherit Creek lands until the failure of the line of Creek blood.

The first proviso names two distinct classes who may inherit Creek land by descent from Creek allottees, immediately or mediately: *First*, those kindred who are Creek citizens; *second*, those kindred who are Creek descendants of Creek citizens. The addition of the phrase "and their Creek descendants" is clearly intended to apply to the second descent and to bar the non-citizen heir of an heir in all cases although such non-citizen heir is qualified to inherit as one of the classes named in chapter 49 of Mansfield's Digest. The proviso was designed to cast the inheritance upon enrolled Creek citizens and their descendants of Creek blood until the failure of those two classes. In other words, the first proviso deals directly with tribal blood or tribal consanguinity, requiring Creek citizenship or Creek blood, or both, as a prerequisite to the right to inherit Creek lands from Creek allottees, immediately or mediately; names two classes who shall inherit immediately or mediately from allottees; and it casts the inheritance upon these two classes in all cases, from inheritance to inheritance, and applies alike to all immediate or mediate descents from the allottee for as long as there remains kindred belonging to either or

both of the two classes. This is made plain by the language of the proviso, which names distinctly the two classes who "shall inherit lands of the Creek Nation." If it had been intended to qualify or limit the inheritance only to cases of descent from the allottee immediately, it is reasonable to suppose that those who negotiated the treaty would have qualified the phrase last quoted by adding the words "from allottees" or by adding words of similar import. Under this construction of the proviso, Cloria Grayson has no inheritable status and cannot inherit because she is neither a Creek citizen nor a Creek descendant of a Creek citizen and is not a person of Indian blood.

It was expressly held in the case of *Washington* v. *Miller*, 235 U. S. 422, 59 L. ed. 295, *supra*, that the proviso of the Creek Supplemental Agreement above quoted was in force in the Creek Nation on November 3, 1907, which was after the date of the death of Gertrude Grayson in the present case. The decision of the Oklahoma Supreme Court is based on the proposition that the proviso to the Creek Supplemental Agreement does not apply to the second descent of an allotment. It is not pointed out in the opinion wherein any second descent was involved in the present case; and as a matter of fact as we shall point out under our second proposition, it was a first descent, for Gertrude Grayson received the allotment in controversy and the real question involved was and is: Who took the land upon her

death? So that the proposition on which the case is claimed to be decided had no basis in fact, but the doctrine that the proviso quoted above does not apply to the second descent, seems squarely contrary to the language used in *Washington* v. *Miller, supra,* in which it is said, after quoting the language of section 6 of the Creek Supplemental Agreement:

> "The first contention requiring consideration is that the two provisos do not affect the right to inherit from one who dies after receiving his allotment, but only the right to receive lands from the tribe in place of one who was entitled to an allotment and died before receiving it. The contention rests upon the words 'lands of the Creek Nation' in the first proviso, and is sought to be sustained upon the theory that lands which have been allotted and passed into private ownership are no longer lands of the tribe, and therefore not within the provisos. We think the words indicated were merely descriptive of the body of lands which were being allotted in severalty and subjected to the incidents of individual ownership; that is, the lands in the Creek Nation.
>
> "In that sense they would include the lands as well after allotment as before. The section as a whole shows that it looked to the future no less than to the present, and was intended to prescribe rules of descent applicable to all Creek allotments. Nothing in the provisos indicates that they were to be less comprehensive. Their purpose was to give Creek citizens and their Creek descendants a preferred right to inherit, and no reason is perceived for giving such a preference where a citizen entitled to an allot-

ment died before receiving it that would not be equally applicable if he had died after it was received. We conclude, therefore, that the contention is not well founded."

Now let us view the proviso in the light of the construction placed thereon by the decision just quoted. That decision says that the words of the proviso "lands of the Creek Nation" means "lands *in* the Creek Nation." This construction is beyond question correct as the legislation was being written with reference to the body of land or domain which the Creek Nation comprised and which land was then being parceled out in severalty to the members of the tribe and could only have been intended to apply to such severalties as carved from this body of land as the intent then was to make provision for the ownership and continued ownership of these different severalties so carved from said body.

That it applied to these different severalties carved from this body so comprised by said Creek Nation, is made clear wherein the proviso says that only such Creek citizens and their Creek descendants shall "*inherit* lands of the Creek Nation" as these words of the proviso could only refer to the individual allotments and the passage thereof for the reason that no one could "inherit" from the Creek Nation as the Creek Nation is a mythical or fictitious entity which necessarily could have no heirs. Then the proviso could only have reference to the inheriting of these lands as parceled out, which lands were

"in" or a parcel of the said body of land or domain of the said Nation; and unless an heir asserting claim to such lands could show that he was a Creek citizen or a Creek descendant of such citizen, he could not inherit these lands which were "in" the said Creek Nation. It could not possibly matter how many different times the land allotted should pass after being allotted and it made no difference whether the prospective heir claimed upon first descent, second descent and so on, as to the said lands, as he is conclusively bound by the wording of said provision that he cannot "inherit" such lands "*in* the Creek Nation" unless such heir were a Creek citizen or Creek descendant of such citizen; under the plain provisions of the legislation being barred from inheriting lands "*in* the Creek Nation" unless a Creek citizen or Creek descendant of such citizen, this forecloses any investigation or argument as to whether or not it is a first descent, second descent, and so on, as such lands would still be lands "*in* the Creek Nation" regardless of the number of descents. The non-citizen heir cannot inherit any land "*in* the Creek Nation" so long as there are Creek heirs.

This doctrine is also squarely contrary to the purpose of the provision in the treaty as expressed in the opinion in *Campbell* v. *Wadsworth,* 248 U. S. 169, at 175, 63 L. ed. 192, at 196, wherein it is said:

> "While it is true that it seems unnatural for the Indians to have preferred more distant relatives to their own children in providing for

> the descent and distribution of their property, yet from the terms of the act before us, and also from the provisions of the Supplemental Creek Agreement that 'only citizens of the Creek Nation, male and female, and their Creek descendants, shall inherit the land of the Creek Nation' (32 Stat. at L. 500, Chap. 1323), it is clear that with the Indians the interests of the tribe were paramount to those of the family, and it was with a knowledge of the mode of life of their primitive people, better and more intimate than the courts can now command, that they determined that this paramount purpose would best be served by giving to children born of mixed marriages the tribal status of their mother."

As a matter of fact, there can be no reasonable basis for the attempted distinction on the part of the Oklahoma Supreme Court. Either the proviso of the Creek Supplemental Agreement applies to all cases where the descent was cast prior to statehood or it applies to none. The decision is in effect a repeal by construction of the plain provisions of a treaty with a tribe of Indians, which treaty was confirmed by an Act of Congress.

The distinction attempted to be drawn by the Oklahoma Supreme Court is also contrary to the principle of the holding of the same court in *Brown* v. *Minshall,* 83 Okl. 98, 202 Pac. 1037, in which a somewhat similar question was involved, and the court there held:

> "Section 9 of the Act of May 27, 1908 (c. 199, 35 Stat. 312), provided: 'That the death of

any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land; *Provided*, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee.' *Held*, that the restriction contained in the proviso of said section 9, *supra*, runs with the land so long as such allotted lands are inheritable by full-blood Indian heirs, or until the restrictions expire by operation of law on April 26, 1931."

In *McDougal* v. *McKay*, 237 U. S. 372, 35 Sup. Ct. Rep. 605, 59 L. ed. 1001, it was held that under the Supplemental Creek Agreement the Creek father of a child born of his marriage with a non-Creek mother inherited the entire estate of the child, which died intestate, although his wife would have taken equally with him had she been an enrolled Creek.

A study of the foregoing decisions of the United States Supreme Court convinces us that they are in harmony with our construction of the proviso. There is nothing in the decisions of this court indicating a contrary view or that the proviso should be construed to be less comprehensive in effect.

—*Lamb* v. *Baker*, 27 Okl. 739, 117 Pac. 189;
Hughes Land Co. v. *Bailey*, 30 Okl. 196, 120 Pac. 490;
Cowokochee v. *Chapman*, 67 Okl. 263, 171 Pac. 50;
Bruner v. *Oswald*, 72 Okl. . . ., 178 Pac. 693;

Thorne v. *Cone*, 47 Okl. 781, 150 Pac. 701;
Moffer v. *Jones*, 67 Okl. 171, 169 Pac. 652.

See, also:

Grease v. *McNac, et al.*, Vol. XX, No. 13 Okl. App. Ct. Rep. Issue of Feb. 1, 1924—p. 320, Case. No. 12013—decided Jan. 30, 1923.

We are unable to state our contention in plainer terms than it is stated in the words of the two provisos. The language of the provisos shows that the tribe intended to exclude non-citizens from inheriting Creek lands in all cases, from inheritance to inheritance, without regard to whether they were in the line of ascent or descent, or collaterals, except in cases where there are no Creek citizen heirs or no Creek descendants of Creek citizens. In other words, Creek citizens and their Creek descendants are given the preferred right to inherit in all cases to the exclusion of non-citizen heirs without regard to the degree of relationship, near or remote. Non-citizen heirs could inherit in no event unless there was a total absence of relatives who were Creek citizens or Creek descendants of Creek citizens. Any other construction does violence to the plain intent and purpose of the provisos. The second proviso expressly says when non-citizens shall inherit "if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in chapter 49." The treaty nowhere says that non-cit-

izen heirs in any case, in any inheritance, shall ever have equality with citizens heirs and their heirs of Creek blood. Such a provision would have rendered both provisos absolutely meaningless and useless for the reason that in that event the nearest in line under chapter 49 of Mansfield's Digest would have taken the inheritance anyway whether citizen or non-citizen.

The treaty should be given the meaning that the Indians intended it should have.

—*Jones* v. *Meehan*, 175 U. S. 1, 44 L. ed. 49;
Washington v. *Miller, supra;*
Campbell v. *Wadsworth, supra.*

What did the Indians mean when they said "only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation," and what did they mean when they said, "if there be no person of Creek citizenship to take the descent * * * then the inheritance shall go to non-citizen * * *". Surely they intended these expressions to mean just exactly what they say, and if they intended them to have any meaning at all, that meaning must be that non-citizens are in all cases, and in all descents, absolutely excluded unless there be no person of Creek citizenship or blood to take the inheritance. The provisos clearly mean that non-citizens can never inherit in any case except to save escheat. They plainly mean that non-citizens are to be treated as aliens wholly without

any right to inherit Creek land in any case unless there is a total failure of relatives of Creek citizenship or Creek blood.

Our construction of the provisos follows an axiomatic principle. It is embodied in the maxim "a thing expressed puts an end to implication." On their face, the provisos show that they were intended for future as well as present application; that they were intended to prescribe rules of descent applicable to all Creek lands, and nothing in them indicates that they were to be less comprehensive. Their plain purpose was to give Creek citizens and their Creek descendants a preferred right to inherit Creek lands in every case. This is the meaning given the provisos by the United States Supreme Court in *Washington* v. *Miller, supra,* and by necessary implication the meaning again given to them by the same court in *Campbell* v. *Wadsworth, supra.* That meaning was correctly ascertained from the language of the provisos themselves, and not from conjecture *aliunde.*

—*Gardner* v. *Collins,* 2 Pet. 58, 7 L. ed. 347.

The current of authority at the present day is in favor of reading statutes according to the natural and most obvious import of the language without resorting to subtle and forced constructions for the purpose of either limiting or extending their operations.

—*Wailer* v. *Harris,* (N. Y.) 20 Wend. 555, 32 Am. Dec. 590, and note.

A secret intention of the law making body cannot be legally interpreted into a statute which is plain and unambiguous and which does not express or imply it.

—*United States* v. *Colorado, etc. R. Co.*, 157 Fed. 321, 85 C. C. A. 27, 14 Ann. Cas. 893, 15 L. R. A. (N. S.) 167.

Courts cannot read into the statute something that is not within the manifest intention of the law making body as gathered from the words of the statute itself. When courts ignore this rule, construction becomes legislation in disguise. To depart from the meaning expressed by the words of the statute is to alter the statute, to legislate and not to interpret.

—*Wabash R. Co.* v. *United States*, 178 Fed. 5, 101 C. C. A. 133, 21 Ann. Cas. 819;

Young v. *Regents of University*, 77 Kan. 239, 124 Pac. 150, Ann. Cas. 1913-D. 701.

If the true construction will be followed with harsh consequences, it cannot influence the courts in construing the law. The responsibility for the justice or wisdom of the law rests with the law makers, and it is the province of the courts to construe, not to make the law.

—*Campbell* v. *Wadsworth, supra;*

U. S. v. *Detroit First Nat. Bk.*, 234 U. S. 235, 34 Sup. Ct. Rep. 846, 58 L. ed. 1298.

There is a marked distinction between liberal construction of statutes, by which courts, from the

language used, the subject-matter, and the purpose of those framing them, find out their true meaning, and the act of a court in ingrafting upon a law something that has been omitted, which the court believes ought to have been embraced. The former is a legitimate and recognized rule of construction, while the latter is judicial legislation, forbidden by the constitutional provisions distributing the powers of government among three departments, the legislative, the executive, and the judicial.

—*Chase* v. *Swayne*, 88 Tex. 218, 30 S. W. 1049, 53 A. S. R. 742.

The plain and evident intent of the Indians by the express provisos set out above was to keep the Creek lands, then being partitioned among the members of the tribe, in the ownership of the members of the tribe, the blood, as long as possible, thus preserving by that method as certainly as it could be done the semblance of the old tribal life and tribal ownership; this was a matter of the strongest sentiment with the Indian; the tribal interests had always been paramount with the Indians and it was therefore but natural that the Indians' most ardent wish should be that their mode of life enjoyed by them as a tribe in happiness for ages past should be preserved; this doubtless occupied the foremost place in their thoughts now that the time had come for a modified departure from the old customs and mode of life. The human race has always moved on slowly. Our

progress and change in mode of life has always been slow and gradual; we cling to the safe moorings of the fathers; great changes in our national ideas, ideals and mode of life do not come over night. It takes ages and generation upon generation to bring about marked changes, so slow and gradual that the transformation is imperceptible in the making. This court recognized and gave effect to this feeling and sentiment of the Indian in *Campbell* v. *Wadsworth, supra,* wherein it was said: "It is clear that with the Indians the interests of the tribe were paramount to those of the family and it was with a knowledge of the mode of life of that primitive people better and more intimate than the courts can now command that they determined that this paramount purpose would best be served by giving to children born of mixed marriages the tribal status of their mother." This intent and hope of the Indian, which they clearly believed was preserved by the provisos, would be utterly wrecked if the provisos are to be disregarded after their allotment had been cast by descent but once; whereas the Indian had hoped to preserve the tribal semblance and aspect for many years, it would now be obliterated in but a short time.

The Indians' wish and intent should be respected; but it will not be given effect if these lands are to pass into other hands while the members of the tribe, the blood, stand by, unheeded spectators, barred from their inheritance, the native lands of their

fathers, by other relatives who are not of Indian blood and cannot know and feel the sentiment or understanding of the old Indian mode of life; the provisos are subject to no such construction; the land was not to be taken from the Indian blood so long as there was an Indian by blood to receive it; it could not matter when the descent was cast or the number of times the inheritance, the allotment, descended. The ever present and prevailing idea of the Indian was that whenever any of this land descended it went to the relatives of the Creek blood if there were any; the other circumstances under which it descended were not to be considered, otherwise it would have been so stated. The Indians wanted to hold intact in the members of their blood the territorial integrity of the old tribal homestead, their native land, as long as possible and thus keep them together as a tribe or nation; they wanted the members of their tribe, their blood, to own and enjoy these lands to the last generation and until they became extinct; any other view is excluded by the second paragraph of the proviso, which states:

> "And provided further that: if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said chapter 49."

How could this hope be effected if the lands are to pass into other hands after the first generation, after the allotment had passed by inheritance but

once? The Indians knew that in the natural course of things these lands must pass on down for generation after generation, necessitating the land passing by descent after descent for a large number of times. Yet no mention in the proviso was made of any distinction which should be made as to whom the land should descend in such cases, thereby conclusively evidencing the intent of the Indian that the land should descend according to these provisos regardless of when the descent was cast or the number of times the same had been cast. This intent of the Indians could hardly have been expressed in more explicit and exclusive language than is used in said provisos.

II.

Under the provisions of section 28 of an Act of Congress approved March 1, 1901 (31 Stat. L. 861), known as the Original Creek Agreement, as modified by section 6 of the Supplemental Agreement (Act of June 30, 1902), a Creek citizen who died before receiving his allotment of lands at the time of his death was not seized of an inheritable estate in lands afterwards allotted to him or to his heirs and the first descent occurs upon the death of the heir or heirs to whom said lands were allotted.

The Original Creek Agreement, approved March 1, 1901 (31 Stat. L. 861), was ratified and became effective on May 25th, 1901. Section 28 provides:

"All citizens who were living on the first day of April, 1899, entitled to be enrolled under section twenty-one of the Act of Congress approved June 28, 1898, entitled 'An Act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if any such citizen has died since that time, or may hereinafter died, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation and be allotted and distributed to them accordingly."

The Act of May 2, 1902 (32 Stat. L. 245 at 258), is amendatory of section 28 and is as follows:

"And provided further, that the act entitled 'An Act to ratify and confirm an agreement with the Muskogee or Creek Tribe of Indians, and for other purposes,' approved March 1, 1901, insofar as it provides for descent and distribution according to the laws of the Creek Nation, is hereby repealed, and the descent and distribution of lands and monies provided for in said act shall be in accordance with the provisions of chapter 49 of Mansfield's Digest of the Statutes of Arkansas in force in the Indian Territory."

It was further amended by section 6 of the Supplemental Agreement, *supra*, in the particulars hereinbefore mentioned.

It will be noted that under the provisions of section 28 of the Original Creek Agreement it was provided that the land to which a deceased member of the tribe would have been entitled if living should descend to his heirs according to the laws of "descent and distribution of the Creek Nation and be *allotted* and distributed to them accordingly".

This clearly contemplated that the allotment was to be made directly to the heirs of the deceased Creek citizen and constituted them the original takers.

The District Court, in his seventh and eighth findings of fact, found as follows (Rec., pp. 46-47):

> "*Seventh.* That on the 9th day of July, 1906, there was allotted in the name of Nancy Colbert to her Creek heirs the following described lands of the Creek Nation, to-wit: * * *
>
> "*Eighth.* That on the 9th day of July, 1906, there was allotted in the name of Garfield Colbert to his heirs the following described lands of the Creek Nation, to-wit: * * *"

And the Supreme Court of the state, in its opinion, referring to the date of the selection, said:

> "And at that time one Gertrude Grayson succeeded to the half interest in question by operation of law in both said allotments. The said Gertrude Grayson departed this life in April, 1907, intestate, never having been married, and without issue, and it is the interest which the said Gertrude Grayson is admitted to have had at her death that is in controversy here."

Since Gertrude Grayson received the allotments in controversy under the provisions of the applicable laws above quoted, she was the first taker and the first descent was from her to her heirs, the petitioners in this case, who were the plaintiffs in the District Court. Under these acts Nancy Colbert and Garfield Colbert, at the time of their respective deaths, were not seized of any inheritable estate in these lands. This is the holding of both the state and federal courts.

In *McKee* v. *Henry*, 201 Fed. 74, 119 C. C. A. 312, the Circuit Court of Appeals, speaking through SMITH, Circuit Judge, held as follows:

> "In *Woodbury* v. *United States*, 170 Fed. 302, 95 C. C. A. 498, this court characterized the right of an Indian after his enrollment, but before allotment, as a 'mere float, giving him no right to any specific property'. When the allotment was made for the first time the rights of any individual vested, and the title became vested in the one at that time fixed by the law, and it makes no difference what previous laws may have provided. In the conclusion we have reached we find that we are in harmony with the Supreme Court of Oklahoma. *Brady* v. *Sizemore*, (33 Okl. 169) 124 Pac. 615; *Shellenbarger* v. *Fewel*, (34 Okl. 79) 124 Pac. 617. While our conclusion has been reached upon the authority of the Supreme Court of the United States, of this court, and what seems to us sound reason, it is gratifying to find that there is uniformity in the decisions of the state courts and this court. At any time after enrollment, and before allot-

ment, Congress could have repealed all legislation providing for allotment, and have restored the old system of tribal control; and, if this is true, manifestly no inheritable interest vested in any one until allotment."

In *Sizemore* v. *Brady*, 235 U. S. 441, 59 L. ed. 311, this court, speaking through Mr. Justice VAN DEVANTER, relative to the character of allotments made after death of Creek citizens, said:

> "Ellis Grayson was living April 1, 1899, and entitled to enrollment. Had he lived he would have been entitled, under the Original Agreement, to participate in the allotment and distribution of the tribal property. But he died March 1, 1901, before the agreement went into effect, and without receiving any part of the lands or funds of the tribe. In these circumstances the agreement contemplated that his heirs should take his place in the allotment and distribution, and should receive 'the lands and money to which he would be entitled, if living'; and it also contemplated that effect should be given to the Creek laws of descent and distribution in determining who were his heirs and in what proportions they were to take the property passed to them in his right. But, as before said, the Act of May 27, 1902, and the Supplemental Agreement, repealed the provision giving effect to the Creek laws of descent and distribution, and substituted in their stead the laws of Arkansas embodied in chapter 49 of Mansfield's Digest. * * *"

This court, in the language just quoted, clearly expresses our idea that these heirs received the lands

by allotment and you look to the applicable laws of descent and distribution in determining who took and in what proportion.

The Supreme Court of Oklahoma has repeatedly held that a Creek citizen who died before receiving his allotment was not seized at the time of his death of an inheritable estate afterwards allotted to him or his heirs.

—*McDonald, et al.*, v. *Ralston, et al.*, 65 Okl. 277, 166 Pac. 405;

Hamilton, et al., v. *Bahnsen, et al.*, 75 Okl. 216, 183 Pac. 413;

Brady v. *Sizemore*, 33 Okl. 169, 124 Pac. 615;

Scott v. *Jacobs*, 40 Okl. 522, 140 Pac. 148.

Upon consideration of the above quoted provisions of the Creek treaties and the decisions of this court and other courts, we think the conclusion is irresistible that there was no descent of the allotments of Nancy Colbert and Garfield Colbert, in the sense in which that word is generally and properly understood by the courts and the bar, until the death of Gertrude Grayson, the first taker of the part of the Creek lands that she was entitled to and did receive by virtue of her relationship to the deceased allottees. Upon her death these allotments descended to petitioners.

Conclusion.

We respectfully submit that the Supreme Court of Oklahoma erred both in holding that the provisos to section 6 of the Supplemental Creek Agreement did not apply to second descents and in holding that the descent to petitioners in this case was a second descent, and ask this court to reverse the decision of the Supreme Court of Oklahoma with directions to enter judgment for petitioners.

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